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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 9[redacted] 16

COMMONWEALTH OF VIRGINIA,
Petitioner,

vs.

IMPERIAL COAL SALES COMPANY, INCORPORATED.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 924

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

IMPERIAL COAL SALES COMPANY, INCORPORATED.

PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Commonwealth of Virginia respectfully shows to this Honorable Court:

I.

Summary Statement of the Matter Involved.

Your petitioner, the Commonwealth of Virginia, respectfully states that she is aggrieved by the final judgment of the Supreme Court of Appeals of Virginia, rendered on the 11th day of January, 1934, in a suit wherein the respondent was exonerated from the payment of certain taxes, aggregating $1,579.69, on intangible property of the respondent. The intangible property was the excess of bills and accounts receivable over bills and accounts payable, and money, belonging to respondent (R. 43-44), which items constituted taxable "capital" as defined by the Vir-

ginia statute (Appendix hereto, p. 25, Section 68 of the Tax Code of Virginia, Acts of Assembly 1928, pp. 35, 63, and Section 73, *Idem.*, as amended, Acts of Assembly 1928, pp. 738, 739). The respondent is a corporation created under the laws of the State of Virginia, with its principal office in Lynchburg, Virginia (R. 10, 16), where all of its records are kept (R. 33); it is engaged only in the business of selling coal for others on commission by means of written orders and contracts (R. 16, 17); none of the coal is in Virginia at the time of sale and only a negligible amount is sold to purchasers located in Virginia (R. 17-18); a large part of the coal, possibly as much as 90% thereof, is sold by contracts that become effective upon being approved (R. bot. page 29, top p. 30) and which are approved in Lynchburg, Virginia (R. 33-34). The respondent was actively engaged in Virginia in the conduct of an interstate business.

It was stipulated by counsel for the parties in the court of original jurisdiction that "the property constituting the basis of the assessment on capital were (*sic*) on the dates in question the property of the Imperial Coal Sales Company, Inc., and that the income constituting the basis of the income assessment was income earned by the Imperial Coal Sales Company, Incorporated, and that the assessments as made are correct if the Imperial Coal Sales Company, Inc., is subject to any capital or income tax whatever during the years in question by the State of Virginia." (R. 15-16.)

The trial court sustained the contention of the respondent (petitioner there) that the tax on the capital was invalid for the reason that it was a burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution (R. 45) and this view was sustained by the Supreme Court of Appeals of Virginia by

its opinion rendered at the first hearing (R. 46), Epes, J., dissenting (R. 60), and a rehearing was granted in the Supreme Court of Appeals of Virginia and the first opinion was adhered to (R. 61), Epes and Hudgins, JJ., dissenting, and final judgment entered on the 11th day of January, 1934 (R. 61).

It is to be noted that a net income tax as well as an *ad valorem* tax on capital was involved and while the court discussed the non-federal question of interpretation of the State law as to both the income and property tax and held the income tax void on a non-federal ground, it nevertheless said as to the capital tax (R. 52): "We prefer to rest the decision of the validity of the capital tax here considered upon the broad proposition that it is invalid because it is a burden upon interstate commerce forbidden by the Constitution of the United States."

II.

The Issue.

The issue thus presented by this petition is whether the State of Virginia has the power to tax the intangible assets of a Virginia corporation actively engaged in Virginia in the conduct of an interstate business.

III.

Reasons Relied on for the Allowance of the Writ.

A.

Importance of the Question Involved.

The question of taxation of intangible property is one of great importance not only to the State of Virginia, but to the other States in the United States, for in all of them there are, no doubt, persons, firms and corporations en-

gaged solely in interstate commerce. Although in the case at bar there is involved only $1,579.69 of State taxes on intangibles, which is small in comparison with the total revenue of the State of Virginia, it is a tax that would be levied annually and would increase annually with the growth of the business of the respondent and others that are engaged now and that would, no doubt, be attracted by the benefits of the decision to engage in similar businesses. Virginia would become an attractive State in which to locate selling agencies for the vast businesses of the country and the items of excess of receivables over payables and money on deposit—the chief items of taxable "capital" as defined by Virginia statute—would escape all taxes thereon to Virginia, because the owners would be engaged in interstate commerce.

Similar conditions would soon exist, if they are not already existing, in all of the other States, as well as in Virginia, if the decision is allowed to stand.

The present holding removes from the tax field all intangible property belonging to those engaged solely in interstate commerce, unless they also own real estate or tangible property within the taxing jurisdiction. The exemption very materially limits the States' taxable subjects.

It is, therefore, highly important that the question be finally determined by this Court.

B.

Conflict of Decisions.

The Supreme Court of Appeals of Virginia is the highest court of the State of Virginia in which a decision could be had and its decision in the case at bar, in holding that the capital tax is "invalid because it contravenes Article I, Section 8, Subsection 3, of the Constitution of the United States" (R. 50) is contrary to and in conflict with the de-

cisions of this Court in *St. Louis & S. W. Ry. Co.* v. *Nattin*, 277 U. S. 157, 159, and *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission*, 285 U. S. 147, 152, and other applicable decisions of this Court.

The three cases relied upon by the Supreme Court of Appeals of Virginia, *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 (R. 54-55), *Alpha Portland Cement Co.* v. *Mass.*, 268 U. S. 203 (R. 57), *Commonwealth of Virginia* v. *Castner, Curran & Bullitt, Inc.*, 138 Va. 81 (R. 58), can be readily distinguished in that each of them involved a privilege tax, while the tax in the case at bar is a general *ad valorem* property tax. In the *Ozark* case this Court said (266 U. S. 562): "The tax is one upon the privilege or right to do business", and the statute provided that a failure to make the report for the purpose of a proper assessment caused the foreign corporation "to forfeit its right to engage in business" in the taxing State; in the *Alpha Portland Cement* case, the tax was in terms and in effect an excise tax and the statute carried the statutory right of restraint by injunction if the tax be not paid; and in the *Castner* case, the Virginia Court said (138 Va. 97): "The tax sought to be imposed in the instant case is not an income tax, but a license tax for the privilege of doing business in this State * * *", and the Virginia law provided that it was a misdemeanor to conduct a business without taking out the license. (Sec. 136, The Tax Code of Virginia, Acts of Assembly 1928, p. 35, 98.) On the other hand, the tax in the case at bar is a pure property tax, in name and effect, and its enforcement is left to the ordinary means devised for the collection of taxes.

WHEREFORE your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of the State of Virginia, commanding that court

to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 1234, Commonwealth of Virginia, Petitioner, *vs.* Imperial Coal Sales Co., Inc., Respondent, and that the judgment of the Supreme Court of Appeals of Virginia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

COMMONWEALTH OF VIRGINIA.
W. W. MARTIN,
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Counsel for the State Tax Commissioner,
State Office Building, Richmond, Virginia,
Attorneys for Petitioner.

March 17th, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 924

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

IMPERIAL COAL SALES COMPANY, INC.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Court Below.

The majority opinion of the Supreme Court of Appeals of Virginia and the dissenting opinion of Justice Epes upon the original hearing therein will probably appear in 161 Va. and are already printed in 167 S. E. 271. Both opinions are set forth verbatim in the record beginning on page 46.

The opinion of the majority of the same court upon the rehearing, from which opinion Justices Epes and Hudgins dissented without writing dissenting opinions, has not yet been printed but will no doubt also appear in 161 Va.

II.

Jurisdiction.

1. The appellate and supervisory jurisdiction of the Supreme Court of the United States is invoked under Section 237(b), Judicial Code of the United States, as amended by the Act of Feb. 13, 1925 (28 U. S. C. A. Sec. 344(b)), to correct error of the Supreme Court of Appeals of Virginia in the case just referred to under I.

2. Final judgment of the Supreme Court of Appeals of Virginia—which is the highest court of the State of Virginia in which a decision could be had—was entered on the 11th day of January, 1934 (R. 61).

3. The case at bar comes within the appellate jurisdiction of this Court under Section 237(b) of the Judicial Code by reason of the respondent's claim that it was engaged exclusively in interstate commerce (R. 14) and that its property was therefore exempt from State taxation, thus setting up and claiming on behalf of the respondent a right, privilege and immunity under the Constitution of the United States.

The trial court held that, inasmuch as the respondent did exclusively an interstate business, the taxes imposed were a burden upon interstate commerce and, therefore, invalid (R. 48-49), and this view was sustained by the Supreme Court of Appeals of Virginia on the first hearing, Epes, J., dissenting, and again on the rehearing, Epes and Hudgins, JJ., dissenting (R. 61).

The language of the section of the Judicial Code seems to clearly support the right of this court to review the decision and the jurisdiction is supported also by decisions of this Court, namely:

Blodgett v. *Silberman,* 277 U. S. 1 (Case No. 190, October Term, 1927). [The companion case, No. 191, involved a writ of error.]

State of Minnesota v. *Blasius* (decided November 6, 1933), — U. S. —, 54 Sup. Ct. Rep. 34 (No. 7, Oct. Term, 1933).

Adopting the forceful language and reasoning contained in the brief of the distinguished counsel for the petitioner for the writ of certiorari in the *Blodgett* case, *supra*, it is submitted that there can be no limit upon the power of the Commonwealth of Virginia to impose a tax upon the intangibles belonging to a Virginia corporation, with its principal place of businss in Virginia, and actively engaged in Virginia in the conduct of an interstate business, unless that limitation is imposed by the Constitution of the United States, and there is but one final judge of the meaning of that Constitution. We, therefore, respectfully submit that the Commonwealth of Virginia is entitled to have the limits of her power adjudicated by the only court competent finally to determine the issue.

III.

Statement of Case.

This case arises upon a petition of the respondent here (petitioner in trial court) to be exonerated from the payment of certain State taxes on intangible property belonging to it. The property was the "capital", as defined by Virginia law, that belonged to the respondent on January 1, 1928, 1929 and 1930, and consisted of its money and the excess of its bills and accounts receivable over its bills and accounts payable (R. 43, 44).

The respondent is a corporation created under the laws of the State of Virginia, with its principal office in Lynchburg, Virginia (R. 10, 16), where all of its records are kept (R. 33); it is engaged only in the business of selling coal for others on commission by means of written orders

and contracts (R. 16, 17); none of the coal is in Virginia at the time of sale and only a negligible amount is sold to purchasers located in Virginia (R. 17-18); a large part of the coal, possibly as much as 90% thereof, is sold by contracts that become effective upon being approved (R. bot. 29, top 30) and which are approved in Lynchburg, Virginia (R. 33-34). The respondent was actively engaged in Virginia in the conduct of an interstate business.

It was stipulated by counsel for the parties in the court of original jurisdiction that "the property constituting the basis of the assessment on capital were (*sic*) on the dates in question the property of the Imperial Coal Sales Company, Inc., and that the income constituting the basis of the income assessment was income earned by the Imperial Coal Sales Company, Inc., and that the assessments as made are correct if the Imperial Coal Sales Company, Inc., is subject to any capital or income tax whatever during the years in question by the State of Virginia." (R. 15-16.)

The trial court sustained the contention of the respondent (petitioner there), that the tax on the capital was invalid for the reason that it was a burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution (R. 45), and this view was sustained by the Supreme Court of Appeals of Virginia by its opinion rendered at the first hearing (R. 46), Epes, J., dissenting (R. 60), and a rehearing was granted in the Supreme Court of Appeals of Virginia and the first opinion was adhered to (R. 61), Epes and Hudgins, JJ., dissenting, and final judgment entered on the 11th day of January, 1934 (R. 61).

It is to be noted that a net income tax as well as an *ad valorem* tax on capital was involved, and while the court discussed the non-Federal question of interpretation of the State law as to both the income and property tax and held the income tax void on a non-Federal ground, it neverthe-

less said as to the capital tax (R. 52): "We prefer to rest the decision of the validity of the capital tax here considered upon the broad proposition that it is invalid because it is a burden upon interstate commerce forbidden by the Constitution of the United States."

One of the grounds of defense filed in the court of original jurisdiction (R. 15) is as follows:

> "All of the assets used in making up the capital assessed against petitioner were the gross proceeds of interstate commerce and as such not taxable by the State of Virginia."

This was absolutely unsupported by the evidence and a reading of the statute (Appendix A) shows clearly that the law does not impose any such tax. The tax was upon money and the excess of receivables over payables, which is entirely different from a tax on gross proceeds. The distinction is mentioned here simply to avoid the appearance of the unchallenged defense. The point was made but apparently abandoned.

IV.

Specifications of Error.

1. The Supreme Court of Appeals of Virginia erred in holding that the assessment of the State tax upon "capital" was invalid.

2. The Supreme Court of Appeals of Virginia erred in exonerating the respondent from the payment of the tax in question.

3. The Supreme Court of Appeals of Virginia erred in holding that, because the respondent was engaged solely in interstate commerce and had no real estate in Virginia and no tangible property in Virginia, the respondent's intangible property was exempt from all State taxation.

4. The Supreme Court of Appeals of Virginia erred in applying the rule laid down in the cases involving State taxes upon the privilege of engaging in interstate commerce to the case at bar, which involves an ordinary *ad valorem* property tax.

V.

ARGUMENT.

Your petitioner contends that the tax involved in the case at bar was valid, and that the final judgment of the Supreme Court of Appeals of Virginia, sustaining respondent's claim of immunity and exemption, is erroneous for the following reasons:

A. The tax is a general *ad valorem* tax imposed upon property that is within the jurisdiction of Virginia.

B. Even though the respondent was engaged solely in interstate commerce and owned no real estate and no tangible property in Virginia, the tax was valid, since the burden is so indirect as not to amount to a regulation of interstate commerce.

C. The rule laid down in the cases involving privilege taxes on those engaged in interstate commerce is inapplicable to the case at bar, which involves a general *ad valorem* tax.

Point A.

(Assignments of Error, 1 and 2.)

The tax is a general ad valorem tax on property that is within the jurisdiction of Virginia.

Section 68 of the Tax Code of Virginia (Appendix A, *post*) imposes an annual State tax of 75¢ per $100 of actual value of "capital" as defined therein, including such capital as belongs to corporations chartered under the laws of

Virginia (Section 81 of the Tax Code of Virginia, Appendix A, *post*).

The respondent stipulated that it was the owner of the property constituting the basis of the assessment and that if any tax was assessable against it, the tax that was assessed was correct (R. 15-16).

The respondent is a corporation organized under the laws of Virginia, with its principal office in Lynchburg, Virginia (R. 10, 16). The bank account and books and records of the corporation are kept in Lynchburg, Virginia, and invoices are paid and payable there and checks are drawn in that office (R. 33).

The legal title of the capital, its business situs, actual situs and beneficial ownership are all within the jurisdiction of Virginia and there is not the slightest basis for a jurisdictional claim by any other State. Money and credits, such as constitute the basis of the capital tax herein, are taxable at the domicil of the owner and nowhere else.

Baldwin v. *Missouri*, 281 U. S. 586, 591.

See also:

Lawrence v. *State Tax Commission of Mississippi*, 286 U. S. 276.

Point B.

(Assignments of Error, 1, 2, and 3.)

Even though the respondent was engaged solely in interstate commerce and owned no real estate and no tangible property in Virginia, the tax was valid, since the burden is so indirect as not to amount to a regulation of interstate commerce.

The issue under this point is clearly defined by a consideration of the argument of opposing counsel in the lower court and the lower court's opinion.

From page 7 of the original brief of counsel for the respondent in the lower court, we quote as follows:

> "It has not been contended and will not be contended that the State has not a right to assess its ordinary taxes on all tangible property in the State.
>
> • • • • • • •
>
> "It is universally held that such taxes are proper and that the effect on interstate commerce is only indirect."

Then counsel for respondent argued that taxes upon intangible assets have a direct effect upon interstate commerce and the lower court concurred in this argument as appears from the opinion (R. 59) where the court said:

> "From the principles gathered from the cases it seems clear that a corporation engaged in interstate commerce may be taxed by a state on (1) its real estate and tangible personal property situated in the taxing state, and (2) upon its intangible personal property, if in the taxing state it does intrastate business or has any appreciable real or tangible property. But if it has no real or tangible property and does no intrastate business in the taxing state, it cannot be taxed by that state."

The ownership and taxation of Virginia realty and tangible property would, according to the holding and express opinion of the lower court, lift from the interstate commerce of the respondent the burden otherwise resting thereon by reason of Virginia's tax upon the intangibles. If there is piled upon the respondent's interstate commerce the additional burden of real estate and tangible property taxes, the burden upon interstate commerce is lightened—by increasing the tax burden, the commerce burden is decreased, holds the lower court. It is respect-

fully submitted that this is unsound and in direct conflict with the decisions of this Court.

See *St. Louis & S. W. Ry. Co.* v. *Nattin,* 277 U. S. 157, in which case the railway company owned a line of railroad in Bossier parish, Louisiana, and the tax assessing authorities of that parish undertook to lay an *ad valorem* tax upon all property within the parish, including the railroad. The railway company sought an injunction against the enforcement of the tax upon several grounds, one being that it was engaged in interstate commerce and that, therefore, the tax was invalid. See report of case below (27 F. (2d) 766), where the court said that one of the grounds for injunction against the collection of the tax was that the portion of the taxpayer's line within the parish of Bossier forms a part of an interstate railroad, and said assessment levies an unjust burden upon interstate commerce in violation of Section 8, Article 1 of the United States Constitution. The lower court dismissed the bill and this Court affirmed that decision, saying through Mr. Justice McReynolds:

> "Without doubt a local legislative body, when properly authorized, may lay general *ad valorem* taxes upon all property within its jurisdiction, including that of common carriers engaged in interstate commerce, without violating the Federal Constitution. That such taxation does not amount to regulation of interstate commerce is settled doctrine."

No authority was cited for that view as "without doubt" it was "settled doctrine."

See also the most recent statement on the subject, *Eastern Air Transport, Inc.,* v. *South Carolina Tax Commission,* 285 U. S. 147, where Chief Justice Hughes said at page 152:

> " 'It is elementary', said the court in *New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338, 346, 50

S. Ct. 111, 113, 'that a State may tax property used to carry on interstate commerce.' "

The decisions make no distinction between tangible and intangible property. The only limitations are those which relate to the effect of the tax, rather than the nature of the property.

The limits of the rights of Virginia in imposing such a tax are prescribed in the *Express Company Cases,* 165 U. S. 194, 220, where this Court said:

> "Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally as all business is affected by the necessity of contributing to the support of government. *Postal Teleg. Cable Co.* v. *Adams,* 155 U. S. 688."

The same Court upon a rehearing said, through Mr. Justice Brewer (*Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185, 218):

> "Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a State

> to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce."

In *Gloucester Ferry Co.* v. *Commonwealth of Pennsylvania,* 114 U. S. 196, the facts are stated by the Court and may be summarized as follows: The Gloucester Ferry Company, a New Jersey corporation, operated a ferry from Gloucester, in the State of New Jersey, to Philadelphia, in the State of Pennsylvania. It owned or leased ferry boats which it operated, and leased the slip in Philadelphia and owned the one in Gloucester. It was engaged solely in interstate commerce, its entire business consisting of ferrying passengers and freight across the Delaware River. The only property it owned in Pennsylvania was the lease upon the Philadelphia slip or wharf. Its boats were registered in New Jersey. Pennsylvania assessed a tax on its capital stock.

In holding the tax invalid, the Court said this (114 U. S. 206):

> "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to state taxation, provided always it be within the jurisdiction of the State. As said by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 429, 'All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may also be pronounced self-evident.' "

In the *Ferry* case the tax was based upon the appraised value of the entire capital stock of the corporation, while only a negligible portion of the capital stock was represented by property subject to Pennsylvania's jurisdiction.

The court then holding that there was no property, tangible or intangible, of appreciable value within Pennsylvania, the tax must necessarily have been upon the business of interstate commerce and was on that account void.

However, this Court recognized the validity of an *ad valorem* property tax upon intangibles, as is seen from the following quotations from the same opinion (114 U. S. 210):

> "*Under this decision there is no property held by the Gloucester Ferry Company which can be the subject of taxation in Pennsylvania except the lease of the wharf in that State.* Whether that wharf is taxed to the owner or to the lessee it matters not, for no question here is involved in such taxation. *It is admitted that it could be taxed by the State according to its appraised value.*" (Italics supplied.)

And again, in 114 U. S. 217:

> "That freedom [the freedom of transportation between the States secured under the commercial power of Congress] implies exemption from charges *other* than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, *or as ordinary taxes upon the value of the property.*" (Italics supplied.)

It is respectfully asserted that this Court has in the above case indicated its approval of a State *ad valorem* tax upon intangible property (the lease of the wharf) belonging to a foreign corporation, engaged solely in interstate commerce and doing no intrastate business and having no real estate or tangible personal property within the taxing jurisdiction. This being permitted with respect to a foreign corporation, *a fortiori* it should be permitted with respect to a domestic corporation and the capital tax on the Sales Company should on this account be upheld.

> "A State may tax capital used in the business of selling imported goods where it does not appear to be invested in original packages; and capital which was in money on the date to which the assessment related, though on the date it was actually made the capital was invested in goods which were in interstate or foreign transit; * * *." *Commerce Clause of the Federal Constitution, by* E. P. Prentice and J. C. Egan, page 229.

One of the cases cited as authority for a portion of the above is *People* v. *Commissioners,* 104 U. S. 466. In this case, Hanemann, a resident of New York City, "was assessed for taxation as of January 1, 1876, upon his personal estate, exclusive of bank stock, to the amount of $60,000.00." He applied for relief on these grounds: "That the value and amount of all his personal estate, on the first day of January, 1876, and during the period covered by the assessment, did not exceed $125,000, of which $4,500 was invested in railroad bonds, and $1,000 in household furniture; that the remainder was 'continuously employed in the business of exporting cotton from the United States of America to foreign countries, through the Customs Department of the United States aforesaid, and that said employment consists in purchasing and paying for the cotton in different States of the United States, and actually exported by deponent in said business, and for the payment of all the expenses of shipping the same as such exports,' and that the only portion of his estate upon which he is liable to be assessed and taxed is the sum of $5,500. In his examination before the tax commissioners, upon the occasion of his application for reduction or remission, he further stated that 'his said capital is invested uniformly and continuously in cotton, the product of, and having a situs in, various States outside of New York, and in transit to the port of New York, and

other Atlantic ports, for the sole purpose of exportation, and no portion of such cotton is intended to be, or is, sold in New York, or any other United States market; that deponent purchases cotton largely upon credit, and that of his capital as much as $115,000 is continuously invested in cotton of the growth of the United States, which has been cleared at a custom-house, and is on shipboard in course of exportation to some foreign State or country'."

The reduction and remission were both denied. The rest of the opinion is short and important, as follows: "The assessment in excess of $5,500, it is claimed by plaintiff in error, was in violation as well of Art. 1, Sect. 10, and clause 2, as of Art. 1, Sect. 8, clause 3, of the National Constitution. The main propositions advanced by his counsel are that products of the United States which have passed the Customs Department, and are on shipboard in the course of exportation to a foreign market, have become exports, and are no longer within the taxing power of the State; that to tax money invested in such products is, in effect, laying an impost or duty on exports; that a tax on capital invested in the products of the United States, in transit from one State to another for purposes of exportation, or on money used and employed in exporting such products, is an unauthorized interference by the State with the regulation of commerce.

"Although these propositions are deemed by counsel to be very easy of solution, we do not feel obliged to determine them in this case. The plaintiff in error was assessed, upon his personal property, as of January 1, 1876. If the capital, which he claims was uniformly and continuously employed in the business of purchasing cotton for exportation from the United States to foreign countries, through the Customs Department, was, in fact, in money on the first day of January, 1876 he could not escape a subsequent assess-

ment of that money upon the ground that, at the time the assessment was made, it was invested in cotton for exportation to foreign countries. Neither in his affidavit nor in his examination before the tax commissioners does he distinctly claim (and, perhaps, could not) that the capital which he thus employed in the business of purchasing cotton for exportation was, in fact, so invested on the first day of January, 1876. His capital may have been, in a business or mercantile sense, continuously so employed, and yet it may not have been, in fact, so invested at the date to which the assessment, whenever made, relates. We have no occasion, therefore, in the present case, to consider or determine the questions of constitutional law discussed by counsel. It will be time enough to consider them when they come before us in such form as to require their determination."

This Honorable Court affirmed the tax, basing its holding upon the fact that, at the date of incidence of the tax, the taxable subject was money—intangible property—not goods in transit to or from a foreign country. Being a tax on intangibles, the Court considered that there was no constitutional question presented, although it was positively shown that the money was used, "in a business or mercantile sense," in foreign commerce. The tax was in name and effect a tax on the intangible property of one engaged in interstate or foreign commerce. This is the exact situation here and it is, therefore, respectfully but urgently submitted that the above case is in support of the tax in the case at bar.

Point C.

(Assignments of Error, 1, 2 and 4.)

The rule laid down in the cases involving privilege taxes on those engaged in interstate commerce is inapplicable to the case at bar, which involves a general ad valorem tax.

There is a recognized distinction between a privilege tax and a property tax, with regard to their effect upon interstate commerce. See *Galveston* v. *Harrisburg, &c., Ry. Co., Texas,* 210 U. S. 217, where it is said at page 225:

> "It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected."

In the same case, at page 227, the Court quoted from *Postal Tel. etc.* v. *Adams,* 155 U. S. 688, 697, as follows:

> "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

See also *Judson,* on *Interstate Commerce* (2nd Ed.), p. 35, where it is said:

> "While a state cannot tax interstate commerce, that is, the privilege of carrying on such commerce, it can tax the property in its jurisdiction employed in carrying on such commerce."

In *Philadelphia, etc.* v. *Pennsylvania,* 122 U. S. 326, 344, the Court said:

> "The decision in this case and the reasoning on which it is founded so far as they relate to the taxation of interstate commerce carried on by corporations ap-

> ply equally to domestic and foreign corporations. No doubt the capital stock of the former, regarded as inhabitants of the State, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign and interstate commerce, so as to make the tax, in effect, a tax on such commerce."

A taxation that affects interstate commerce only by making it more expensive, is not an unlawful regulation of it. *Minor* v. *Philadelphia, etc., R. Co.,* 18 Wall. 206.

There is no discrimination against the respondent here by reason of its interstate commerce. This appears from a reading of the statute and the fact that if the respondent had withdrawn from interstate commerce and had during the years in question engaged solely in intrastate commerce, the tax would have been, nevertheless, the same.

In *Philadelphia, etc.* v. *Pennsylvania, supra,* the Court also said (122 U. S. 345):

> "The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; * * *."

A comparison of the facts and statutes in the cases relied upon by the lower court (*Ozark Pipe Line* and *Alpha Portland Cement,* and *Castner, Curran & Bullitt* cases, *supra*) with the facts and statutes in the instant case shows that each of the former cases involves a privilege tax while the instant case involves a pure property tax in both name and effect. (See Petition for Writ of Certiorari, page 5.)

The lower court, however, said in its opinion (R. 59):

> "While we are aware of the material difference between a privilege tax and a capital and income tax, yet, we will apply the reasoning and principles there discussed to the case at bar because we think the business done by the Sales Company is not subject to State taxation."

While the lower court recognized and discussed the well established doctrines of this Honorable Court to the contrary, it nevertheless illogically held that the tax was invalid "because" it thought that "the business is not subject to State taxation."

Conclusion.

It is, therefore, respectfully submitted that the case at bar is one calling for the exercise, by this Court, of its supervisory powers to correct error of the Supreme Court of Appeals of Virginia in deciding a Federal question of substance in a way not in accord with applicable decisions of this Court. To such end it is respectfully submitted that a Writ of Certiorari should be granted and this Court should review the decision of the Supreme Court of Appeals of the State of Virginia and reverse it.

Respectfully submitted,

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APPENDIX A.

Acts of Assembly of Virginia, 1928, Pages 35, 63.

(The Tax Code of Virginia.)

Sec. 68. Intangible personal property segregated for State taxation only.—Intangible personal property having been segregated for State taxation only, the subjects of taxation classified by this chapter are hereby defined as intangible personal property, and shall be taxed as hereinafter provided, that is to say:

Section 69. [Classifying taxable bonds, notes, etc.]
Section 70. [Classifying taxable money on deposit, expressly excepting "money which is otherwise taxed," such as money included in "capital."]
Section 71. [Classifying taxable shares of stock.]
Section 72. [Classifying taxable municipal and State bonds.]

Section 73. [As amended by Acts of Assembly of Virginia, 1928, pages 738, 739.]
Capital of any trade or business of any person, firm, or corporation, except the capital of any trade or business which capital is otherwise specifically taxed or specifically exempt from taxation.—All capital of any trade or business of any person, firm or corporation, except the capital of any trade or business which is otherwise specifically taxed or specifically exempt from taxation.
Capital as used herein is defined as follows:

First. The inventory of stock on hand, which shall include all materials for use in the business, whether at the place of business, in storage or elsewhere in the State.
Second. The excess of all bills and accounts receivable over bills and accounts payable.
Third. All money on hand and on deposit.
Fourth. All other taxable personal property of any kind whatever, including all choses in action, equities, demands

and claims, but excluding the property hereinafter specifically mentioned in this section.

Real estate shall not be held to be capital under this section, but shall be listed and taxed as other real estate.

Machinery and tools used in a manufacturing or mining business taxable on capital under this section shall not be held to be capital under this section, nor shall such machinery and tools be hereafter assesssed as real estate. All such machinery and tools used in a manufacturing or mining business taxable on capital under this section shall be listed for local taxation exclusively, and each city, town and county is hereby authorized to make a separate classification for all such machinery and tools and to fix the rate of levy thereon, but such rate shall not be higher than the rate imposed upon tangible personal property in such city, town, county or district.

The shares of stock mentioned in section seventy-one of the Tax Code of Virginia, as amended, and bonds of the political sub-divisions of this State mentioned in section seventy-two of the Tax Code of Virginia, as amended, shall not be held to be capital under this section.

Personal property, tangible in fact, used or employed in the trades and businesses hereinafter specifically mentioned in this section shall not be held to be capital under this section, but shall be listed for local taxation exclusively and taxed as tangible personal property, that is to say:

Amusement business, including theatres of every kind and class; auctioneers; barbers, including beauty shops; bowling; billiard and pool rooms; collection agencies; contractors, plumbers and steamfitters; educational institutions whose property is taxable under the Constitution and laws of this State; garage business; hospitals; hotels; laundries, including cleaning, pressing and dyeing establishments; lodging and boarding houses; motor vehicle carriers; photographers; restaurants, including eating houses and cafeterias; shoeshining business; taxi-cab business, including the business of motor vehicle hiring; transfer business; and undertakers and funeral directors.

This section shall not be construed to apply to any profession which the State regulates by law, nor shall it be construed to include the business of farming. Property used or employed in such professions, and in the business of farming, shall be taxable in the actual form in which it may be, and not as capital.

On all capital defined by this section there is hereby annually levied a tax of seventy-five cents on every one hundred dollars of the actual value thereof.

This section, as hereby amended, shall be in force on and after the first day of January, nineteen hundred and twenty-nine.

NOTE: The amendment effective as to the 1929 capital tax in the case at bar, is the one referred to on pages 19 and 20 of the Record herein, but in view of the stipulation (R. 15) the difference between the old and new law is not material to the issues now presented.

Acts of Assembly, 1928, pp. 35, 69.

(The Tax Code of Virginia.)

SECTION 81. Who must file returns of intangible personal property, and where.—Every owner of any taxable intangible personal property and every fiduciary shall annually file under oath a return of intangible personal property on such form or forms as may be prescribed by the department of taxation. Such form or forms may or may not be combined or connected with the form or forms for reporting incomes, as the department of taxation may order from time to time; but if they be so combined or connected all such returns shall be kept under lock and key at all times when they are not in the personal possession of the commissioner of the revenue, department of taxation, or some other person authorized to inspect the same. * * *

Every corporation chartered under the laws of Virginia and owning any taxable intangible personal property, shall file a return thereof with the commissioner of the revenue

for the county or city in which the principal office of the corporation is located by the terms of its certificate of incorporation.

Every corporation chartered under the laws of a State or county other than Virginia, and owning any intangible personal property, taxable in this State, shall file a return thereof with the commissioner of the revenue for the county or city in which is located the place designated by the corporation as the office in Virginia at which all claims against the corporation may be audited, settled and paid.

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